The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KARL DRAGANITSCH and RUDOLF FILA

Appeal 2006-2358
Application 09/817,573
Technology Center 1700

Decided: January 24, 2007

Before BRADLEY R. GARRIS, CHARLES F. WARREN, and JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves 1-6, claims 7-13 have been withdrawn from further consideration (Br. 2). We have jurisdiction under 35 U.S.C. § 134.[1]

We AFFIRM

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[1] An Oral Hearing took place on October 17, 2006.

BACKGROUND

Appellants' invention relates to a method of producing a wafer product containing a food product using at least two wafer sheets. Claim 1, as presented in the Brief, appears below:

1. A method of producing a wafer product, which comprises:

outputting a first wafer sheet with a sugar content of at least 23% or an equivalent content of a sugar substitute from a baking oven;

applying a layer of a food product to the first wafer sheet;

providing a second wafer sheet with a sugar content of at least 23% or an equivalent content of a sugar substitute, and placing the second wafer sheet on the first wafer sheet; and

subsequently compressing the first and second wafer sheets and shaping the first and second wafer sheets containing the layer of the food product while the first and second wafer sheets are maintained in a warm state sufficient to have an elasticity enabling said first and second wafer sheets to be shaped.

The Examiner relies on the following references in rejecting the appealed subject matter:

Wolf	US 2,888,887	Jun. 2, 1959
Haas, Sr.[2]	US 4,518,617	May 21, 1985
Biggs	US 5,709,898	Jan. 20, 1998

The Examiner has entered the following grounds of rejection:

Claims 1-3 and 5-6 stand rejected under 35 U.S.C. § 103(a) as obvious over Wolf and Biggs.

Claim 4 stands rejected under 35 U.S.C. § 103(a) over the combined teachings of Wolf, Biggs, and Haas.

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[2] Hereinafter referred to as "Haas."

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellants regarding the above noted rejections, we make reference to the Answer (mailed July 16, 2003) for the Examiner's reasoning in support of the rejections, and to the Briefs (filed April 28, 2003 and September 16, 2003) for Appellants' arguments thereagainst.

We shall sustain the above noted rejections. Our reasons follow.

OPINION

Claims 1-3 and 5-6 stand rejected under 35 U.S.C. §103(a) as obvious over Wolf and Biggs.

The Examiner has found that Wolf discloses a method of making filled wafer strips. The method comprises the steps of placing a single layer of wafer sheets on a suitable conveyor to form a continuous wafer sheet, covering the layer with a filling material and then covering the filling material layer with a second layer of wafer sheets. The Examiner asserts Wolf does not disclose the sugar content of the wafer, providing an outer coating, and the type of filling materials (Answer 4). The Examiner asserts Biggs discloses a wafer product that comprises 28.7% sugar, and the wafer product has a coating.

The Examiner concluded that it would have been obvious to adjust the sugar content of the wafer depending on the degree of sweetness and the type of filling material use. The Examiner also concluded that it would have been obvious to coat the wafer product with the coating material as taught by Biggs to obtain a different flavor or taste. The Examiner further concluded that it would have been obvious to use any type of filling dependent on the flavor and tastes desired (Answer 4).

Appellants acknowledge that the instantly claimed invention provides a similar process to that of the Wolf reference. That is, the wafer sheets are baked, transported out of the baking oven, provided with a food product (filler layer), then compressed and shaped (Br. 9). However, Appellants argue there is a considerable difference between rolling or other pressing provided by Wolf and the separately claimed steps required by the claimed invention. Specifically Appellants argue that the terms "compressing" and "shaping" as presented in claim 1 denote separate processing steps (Br. 9-10).

Appellants' arguments are not persuasive. Contrary to the Appellants' arguments, the language "compressing" and "shaping" does not require separate processing steps. Appellants' Specification on page 6 discloses that the pressing device can be designed as a shaping device. Wolf describes filled wafer strips that are passed under an equalizing roll that compresses and shapes the wafer strip to a desired final thickness and distributes the filling over the wafer surface (Wolf, col. 3, ll. 17-21). This passing of the strip under the roll accomplishes both the compressing and shaping of the filled wafer strip. As such, this disclosure of the Wolf reference meets the argued claimed invention.

Appellants have not supported their arguments that the sugar content defines the malleability of the wafer product and that the Biggs reference is not properly combinable with Wolf. (Br. 10). The Examiner has responded to Appellants' arguments by questioning the basis of these arguments (Answer 7-8). Appellants have not responded to the Examiner's argument in the responsive Brief. As such, these arguments are not persuasive.

Claim 4 stands rejected under 35 U.S.C. §103(a) over the combined teachings of Wolf, Biggs, and Haas. Appellants have not provided arguments regarding this separate ground of rejection. As such, Appellants have not challenged the suitability of combining the teachings of the Wolf, Biggs, and Haas references as proposed by the Examiner (Answer 5). Since Appellants have failed to substantively challenge the Examiner's basis for combining the references we affirm the Examiner's rejection for the reasons presented by the Examiner.

For the foregoing reasons and those set forth in the Answer, we determine that the Examiner has established a prima facie case of unpatentability under § 103, which has not been adequately rebutted by Appellants. Accordingly, the Examiner's rejections under 35 U.S.C. § 103 are affirmed.

CONCLUSION

The rejections of claims 1-3 and 5-6 under 35 U.S.C. § 103(a) as obvious over Wolf and Biggs and claim 4 under 35 U.S.C. § 103(a) over the combined teachings of Wolf, Biggs, and Haas have been affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv)(2004).

AFFIRMED

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